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No. 04-5462

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

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RONALD ROMPILLA,
*Petitioner,*

v.

JEFFREY A. BEARD, SECRETARY,
PENNSYLVANIA DEPARTMENT OF CORRECTIONS,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

This *amicus* brief will address the following questions on certiorari:

1. Did the defendant receive effective representation at capital sentencing where counsel did not review prior conviction records counsel had been informed the prosecution would use in aggravation, and where those records would have provided mitigating evidence regarding the defendant's traumatic childhood and mental health impairments?

2. Did the defendant receive effective representation at capital sentencing where:

(a) counsel's background mitigation investigation was limited to conversations with a few family members;

(b) the few people with whom counsel spoke indicated to counsel that they did not know much about the defendant and could not help with background mitigation;

(c) other sources of background information, including other family members, prior conviction records, prison records, juvenile court records and school records, were available but ignored by counsel; and

(d) the records and other family members would have provided compelling mitigating evidence about the defendant's traumatic childhood, mental retardation and psychological disturbances.

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## BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

### INTEREST OF *AMICUS CURIAE*[1]

The American Bar Association ("ABA") is the world's largest voluntary professional membership organization and the leading organization of the legal profession in the United States. Its more than 408,000 members include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in allied fields.[2]

The ABA's mission is, in part, to serve the public and the profession by advocating for the ethical and effective representation of all clients. For nearly one hundred years, the ABA has provided leadership in legal ethics and professional responsibility, establishing the foundation for a lawyer's obligations to his client in all representations. In 1908, the ABA adopted the original Canons of Professional Ethics; in 1969, the Model Code of Professional Responsibility; and, in 1983, the ABA adopted the Model

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Their letters of consent have been lodged with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

Rules of Professional Conduct, which were amended by the work of the "Ethics 2000" Commission in February 2002.

The ABA has a well-established tradition of advocating for the effective representation of clients in criminal cases in general, and in capital cases in particular. The ABA takes no position on the death penalty as a general matter. However, the ABA has adopted numerous policies concerning the administration of justice and the effective representation of criminal defendants. The ABA is especially concerned about the effective representation of criminal defendants who might be or have been sentenced to death.[3] One of the several ABA entities that focus on legal issues related to capital punishment is the Special Committee on Death Penalty Representation, which recruits, trains, and supports volunteer counsel to represent death row inmates who lack lawyers.

In 1989, the ABA House of Delegates adopted Resolution 122, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (hereinafter the "*ABA Guidelines*"), which were designed to "amplify previously adopted Association positions on effective assistance of counsel in capital cases [and to] enumerate the minimal resources and practices necessary to provide effective assistance of counsel." *ABA Guidelines*,[4] intro. cmt.

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[3] *See, e.g., ABA Standards for Criminal Justice: Providing Defense Services*, § 5-1.2 cmt. (3d ed. 1992) ("American Bar Association resolutions have frequently and consistently taken positions supporting the provision of quality representation by counsel in capital cases."); ABA House of Delegates Resolution 122, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989); American Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 Am. U. L. Rev. 1 (1990).

[4] The *ABA Guidelines* can be found at http://www.abanet.org/deathpenalty.



(1989).[5] In February 2003, the ABA House of Delegates approved revisions to the *ABA Guidelines* to update and expand upon the obligations of death penalty jurisdictions and lawyers to ensure due process of law and justice. *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) (hereinafter the "*Updated ABA Guidelines*").[6]

Both versions of the *ABA Guidelines* are based on the experiences of practitioners and ABA members who have handled post-conviction cases on collateral review. They reflect lessons learned from problems created by inadequate, unprepared, and under-financed counsel who represented at trial those accused of capital crimes. Today, the ABA calls upon each death penalty jurisdiction to adopt the *Updated ABA Guidelines*.

The ABA submits this brief as *amicus curiae* because the *ABA Guidelines* may be helpful to this Court's determination whether counsel's performance in preparing for the capital sentencing hearing in this case was objectively reasonable in light of prevailing professional norms.

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[5] *See also ABA Standards for Criminal Justice: Providing Defense Services*, § 5-1.2 cmt. at 12 (3d ed. 1992) ("These guidelines are incorporated by reference into the [ABA Providing Defense Services Standards]."); *ABA Standards for Criminal Justice: Prosecution Function and Defense Function*, § 4-1.2(c) (3d ed. 1993) ("Defense counsel should comply with the [ABA Guidelines.]").

[6] The *Updated Guidelines* also appear at http://www.abanet.org/deathpenalty.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The decision of the Third Circuit Court of Appeals reinstating Petitioner Ronald Rompilla's death sentence should be reversed. Trial counsel's investigation did not comply with prevailing professional norms such as those reflected in the *ABA Guidelines*. The *ABA Guidelines* codify longstanding standards prevalent in the profession for the "minimal resources and practices necessary" for competent representation of a client in a capital case. *ABA Guidelines*, intro. cmt. Counsel's conduct in this case fell far short of what the *ABA Guidelines* require, for counsel failed to investigate adequately either the mitigating or aggravating evidence that was reasonably available.

As the *ABA Guidelines* demonstrate, lawyers handling capital cases cannot make key strategic decisions in consultation with their clients that are either constitutionally or ethically sufficient without conducting a reasonably complete and thorough background investigation. Lawyers have an independent duty to see that this investigation is conducted, and must not delegate the responsibility to others, including experts hired by counsel. Lawyers also have a duty to conduct a thorough background investigation even if the client and his or her family members are not cooperative. Lawyers and their clients must be properly informed with regard to the many choices that must be made concerning the guilt/innocence phase and the penalty phase of a capital trial. They cannot act reasonably if they lack an informed basis for choosing one defense over another, presenting some facts over others, or pursuing one sentencing strategy over another.

In this case, a review of the reasonableness of counsel's investigation under the standards codified by the *ABA Guidelines* suggests that counsel did not perform reasonably in view of prevailing professional norms. Mr. Rompilla's



counsel failed to conduct a basic background investigation and to obtain records that were readily available; counsel improperly delegated their responsibility to investigate to experts; and counsel failed to conduct even a minimal investigation of the aggravating evidence that the prosecution gave notice it intended to introduce, which contained leads to key mitigating evidence. Under the *ABA Guidelines*, counsel cannot excuse their deficient investigation based on uncooperativeness of the defendant or his family.

Long before the *ABA Guidelines* were promulgated, the profession recognized that competent counsel must investigate the range of mitigating evidence that may be available, and must also investigate the aggravating evidence likely to be offered by the State. The *ABA Guidelines* cautioned lawyers against the consequences of incomplete investigations. The standard of care set forth in the ABA Guidelines resulted from the ABA's study of what reasonably performing lawyers were doing and what ineffectively performing lawyers were not doing.

The *ABA Guidelines* and the *Updated Guidelines* are not proffered to this Court as a substitute for counsel's own determination of the necessary scope of investigation in light of the unique character and background of his or her client. Instead, they can serve as a starting point, reflecting a consensus within the legal profession regarding a minimum standard of reasonable performance, from which a court can, under the circumstances of a particular capital case, determine what investigation was necessary to fulfill counsel's obligations to the client. In this case, counsel did not meet prevailing professional norms reflected in the *ABA Guidelines*.

## ARGUMENT

### I. THE ABA GUIDELINES REFLECT PREVAILING PROFESSIONAL NORMS WITH RESPECT TO INVESTIGATION OF A CAPITAL CASE AND THUS ARE INDICATIVE OF REASONABLENESS.

This Court has long recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like, e.g. *ABA Standards for Criminal Justice* . . . are guides to determining what is reasonable." *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (relying on ABA Standards for Criminal Justice in finding counsel ineffective).[7] Even before the promulgation of the *ABA Guidelines* in February 1989, this Court had recognized the importance of ABA Standards, including the importance of defense counsel's conducting a thorough investigation, a mandate in line with the *ABA Guidelines*. *See, e.g.*, *Strickland*, 466 U.S. at 691; *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986).

[7] The first ABA Guidelines were adopted in February 1989. They reflect prevailing norms in the profession that have existed since the early 1980s. As the ABA made clear in 1989, "the Guidelines amplif[ied] previously adopted Association positions on effective assistance of counsel in capital cases and the need for adequate compensation and support." ABA Standing Comm. on Legal Aid & Indigent Defendants Section of Criminal Justice Section of Litigation, *Report to the House of Delegates*, at 2 (1989); *see Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir. 2003) (*ABA Guidelines* did not "represent norms newly discovered after *Strickland*."). The *Updated ABA Guidelines* reinforce the same minimal standards of investigation as the *ABA Guidelines*. They provide more extensive language and examples regarding the rationale for the policy behind the norms and are cited in this brief to explain the ABA's policy more thoroughly.



This Court has specifically recognized the *ABA Guidelines* as examples of "well-defined norms" of reasonable conduct by defense counsel with respect to the investigation of mitigating and aggravating evidence in capital cases. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). In *Wiggins*, this Court relied on the *ABA Guidelines* as an appropriate benchmark for determining whether counsel's conduct "fell below an objective standard of reasonableness" under *Strickland*. *Wiggins*, 539 U.S. at 521-24. The Court concluded that where "counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources," counsel did not meet the norms expressed in the *ABA Guidelines*. *Id.* at 524 (citing *ABA Guidelines* § 11.4.1(C) and § 11.8.6).

There is also consensus among the lower federal courts that the *ABA Guidelines* evidence prevailing norms against which counsel's conduct should be measured.[8]

Based on this history and precedent, the ABA submits that its *Guidelines* are indicative of prevailing professional

[8] For example, the Sixth Circuit has concluded that "the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases," adding "clarity, detail and content to the more generalized and indefinite 20-year-old language of *Strickland*." *Hamblin*, 354 F.3d at 486; *see also Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004) (citing ABA standards as guides for determining reasonable attorney performance); *Allen v. Woodford*, 366 F.3d 823, 845 (9th Cir. 2004) (noting Supreme Court's reliance on the *ABA Guidelines* in *Wiggins)*; *Roccisano v. Menifee*, 293 F.3d 51, 60 (2d Cir. 2002) (referring to the ABA Standards as "well established principles" of effective assistance of counsel); *Carter v. Bell*, 218 F.3d 581, 596-600 (6th Cir. 2000) (relying on *ABA Guidelines* and concluding that counsel's failure to investigate defendant's family, social or psychological background constituted ineffective assistance of counsel).

norms by which defense counsel's conduct should be evaluated for reasonableness under *Strickland*. Because they reflect professional norms that prevailed in the 1980s, the *ABA Guidelines* are an appropriate benchmark against which counsel's conduct should be judged in this case.

## II. UNDER THE ABA GUIDELINES, COUNSEL ARE EXPECTED TO CONDUCT A THOROUGH INVESTIGATION OF MITIGATING AND AGGRAVATING EVIDENCE, INCLUDING A THOROUGH INVESTIGATION OF THE CLIENT'S BACKGROUND.

Lawyers handling capital cases cannot make key strategic decisions in consultation with their clients that are either constitutionally or ethically sufficient without conducting a reasonably complete and thorough background investigation including investigating both mitigating and aggravating evidence. Lawyers have an independent duty to see that this investigation is conducted, and must not delegate the responsibility to others, including experts hired by counsel. Lawyers also have a duty to conduct a thorough background investigation even if the client and his or her family members are not cooperative.

### A. Counsel Has A Duty To Conduct A Thorough Investigation In Preparation For The Penalty Phase.

A lawyer has an obligation to act with reasonable diligence and promptness in representing his or her client. *See Model Rules of Prof'l Conduct* R. 1.3 (2002). A lawyer's execution of that obligation at all times during the representation enables the client "to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." *Id.* at R. 1.4 cmt. 5. In the context of representing a client in a capital case, and the penalty phase in particular, the obligation to act



with reasonable promptness and diligence applies directly to counsel's decisions to investigate the client's background. To satisfy their ethical obligations, counsel must pursue a thorough investigation of all reasonably available background information. Only when fully armed with the reasonably available information obtained from a thorough investigation can counsel effectively advise the client with respect to different courses of action and comport with *Model Rule 1.4*. *Id.* at R. 1.4.

The *ABA Guidelines* specifically address how counsel should fulfill those ethical obligations in the context of defending a capital case. The *Guidelines* reflect the fact that prevailing professional norms in death penalty cases require that "at every stage of the proceedings, counsel has a duty to investigate the case thoroughly." *Updated ABA Guidelines* § 10.7 cmt. (citations omitted). The *ABA Guidelines* recommend careful preparation by counsel for the penalty phase through investigation, consultation with the client, analysis of the prosecution's case and evaluation of all reasonably available evidence in mitigation. *See ABA Guidelines* § 11.4.1, § 11.8.3, § 11.8.5, and § 11.8.6. Specifically, the *Guidelines* require counsel to conduct sufficient investigation "to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *ABA Guidelines* § 11.4.1(C); *see also* § 11.8.6.; *see also Wiggins*, 539 U.S. at 524-525.

Prior to the adoption of the *ABA Guidelines*, the ABA promulgated standards emphasizing that counsel has the responsibility in a capital case to conduct a thorough investigation of the defendant's background -- including investigating information relevant to sentencing -- from the inception of the representation. *See ABA Standards for Criminal Justice* § 4-4.1 cmt. (2d ed. 1980) ("It is the duty of

the lawyer to conduct a prompt investigation into the circumstances of the case and to explore all avenues leading to the facts relevant to the merits of the case and the penalty in the event of conviction.").[9] "Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough

[9] The notion that effective performance in a capital case requires a thorough investigation was widely accepted among practitioners throughout the 1980s. Articles and attorney handbooks from that time stress that defense counsel in a capital case should investigate the defendant's background, including by reviewing a defendant's prior conviction records, prison records, juvenile court records, school records, and records relating to childhood abuse and substance abuse. *See* Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 323-24 (1983) ("Trial counsel has a duty to investigate the client's life history, and emotional and psychological make-up . . . . There must be an inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology and present feelings. . . . The importance of this investigation, and the thoroughness and care with which it is conducted, cannot be overemphasized."); Lois Heaney, National Jury Project, *Constructing a Social History*, H49-H50 (1983) (a social history of a defendant should include investigating school and other institutional records, as well as any experiences of child abuse, learning disabilities, emotional problems, substance abuse, and involvement with criminal justice, mental health or social service agencies); Michael Morrissey, *Investigating the Death Case, in Illinois Death Penalty Defense Manual*, at 7-9 to 7-13 (Andrea D. Lyon ed., 1988) (describing need for defense counsel investigating penalty phase to obtain school and military records, alcohol and drug history, juvenile court records, prison records, mental health records, criminal records); Kit Keller, *Indiana Death Penalty Manual*, at 7 § 1-13 to 1-14 (1985) (investigation into mitigating factors should identify records relating to childhood trauma, education, employment, military service, physical and mental health, and substance abuse) (citing Butler, *Ohio Death Penalty Manual* (1981)).



investigation with respect to both phases of the case." *Updated ABA Guidelines* § 10.7 cmt. (citations omitted); *see also Hamblin v. Mitchell*, 354 F.3d 482, 492 (6th Cir. 2003).

Indeed, at no time is the thoroughness of counsel's investigation into the client's background more critical than in preparation for the penalty phase of a capital case. *See ABA Guidelines* § 11.4.1 cmt. ("The duty is intensified . . . by the unique nature of the death penalty[.]"). This Court has said that an investigation by counsel that may be adequate for the guilt/innocence phase may be wholly inadequate for the penalty phase. *See e.g., Williams*, 529 U.S. at 395. In both *Williams* and *Wiggins*, this Court stressed that counsel cannot fulfill his or her constitutional duty without conducting a thorough investigation of the available mitigating evidence. *See, e.g., Williams*, 529 U.S. at 396 (counsel failed to fulfill his obligation to conduct a thorough investigation of the defendant's background because he failed to uncover and present mitigating evidence); *Wiggins*, 539 U.S. at 522 (counsel's failure to present mitigating evidence of defendant's background prejudiced sentencing decision).

In this case, counsel's conduct fell far short of prevailing professional norms as reflected in the *ABA Guidelines*. Counsel not only failed to conduct a basic background investigation and obtain records that were readily available, they also did not conduct a minimal investigation into the aggravating evidence that the prosecution gave notice it intended to introduce at sentencing. The record shows that had counsel conducted a minimal investigation of the aggravating evidence, they would have uncovered much in that process that actually would have been mitigating.

Counsel here did not claim that they conducted a thorough investigation and made a strategic decision not to offer more evidence in mitigation. *See, e.g., Strickland*, 466 U.S. at 673; *Wiggins*, 539 U.S. at 521. Quite to the contrary,

trial counsel testified at the post-conviction hearing that they would have presented other mitigating evidence if they had been aware of it. *Rompilla v. Horn*, 355 F.3d 233, 279-281 (3d Cir. 2004) (Sloviter, J., dissenting). Counsel simply did not do enough background investigation to make the necessary strategic decisions. *See Wiggins*, 539 U.S. at 521-22; *Strickland*, 466 U.S. at 690-91.

### B. Counsel Has An Obligation To Investigate All Reasonably Available Mitigating Evidence Regarding The Client's Background.

A thorough investigation must include an investigation of the client's background, for the Eighth Amendment mandates consideration of the "character and record of the offender" as part of the capital sentencing process. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). "[I]f the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)), *rev'd on other grounds*, *Atkins v. Virginia*, 536 U.S. 304 (2002).

To prepare effectively for the penalty phase, counsel should explore at a minimum, all reasonably available sources of mitigation evidence. *See generally ABA Guidelines* § 11.4.1. A reasonable background investigation for the penalty phase includes a review of all reasonably available documents and records. *Updated ABA Guidelines* § 10.7 cmt.; *see also ABA Guidelines* § 11.4.1(D)(2)(c). The *ABA Guidelines* advise that counsel should even "seek



necessary releases for securing confidential records[.]" *ABA Guidelines* § 11.4.1(D)(2)(d). Those background "[r]ecords - from courts, government agencies, the military, employers, etc. - can contain a wealth of mitigating evidence, documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness, and corroborating witness' recollections." *Updated ABA Guidelines* § 10.7 cmt. (citations omitted).

As the *ABA Guidelines* explain, sources of mitigation information for the penalty phase may include: charging documents, interviews with the client, interviews with family members, interviews with witnesses, interviews with others familiar with the client's life history, police reports and other physical evidence in possession of the police, review of the scene, the client's background records, and expert witnesses. *ABA Guidelines* § 11.4.1(D). Counsel should research those sources to develop and consider all reasonably available mitigation evidence regarding the client in the following areas:

> medical history, (mental and physical illness or injury, alcohol and drug use, birth trauma, and developmental delays); educational history (achievement, performance and behavior); special educational needs (including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct on supervision and in the institution, education or training, and clinical services); and religious and cultural influences.

*ABA Guidelines* § 11.4.1, *see also* § 11.8.6 (B); *Updated ABA Guidelines* § 10.7 cmt. ("Counsel should use all appropriate avenues . . . to obtain all potentially relevant information pertaining to the client, his or her siblings and parents, and other family members, including but not limited to: a. school records, b. social service and welfare records, c. juvenile dependency or family court records, d. medical records, e. military records, f. employment records, g. criminal and correctional records, h. family birth, marriage, and death records, i. alcohol and drug abuse assessment or treatment records, and j. INS records"). If counsel's interviews with the client do not immediately suggest that relevant mitigation evidence is available, or if the client does not want to put forth mitigating evidence, counsel should nonetheless investigate all available sources.

This Court and other courts have emphasized that obtaining available records pertaining to the client's background is a critical element of investigation in death penalty cases. In *Wiggins*, this Court held that the lower court unreasonably applied *Strickland* in part because defense counsel's investigation did not extend beyond the pre-sentence investigation report and the Department of Social Services' records when other records, of the kind recommended by the *ABA Guidelines*, were available. *Wiggins*, 539 U.S. at 530-31. In *Williams*, this Court found that counsel was ineffective where they "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation, but because they incorrectly thought that state law barred access to such records." *Williams*, 529 U.S. at 365. There is consensus in the lower federal courts that counsel must obtain background records in order to conduct a constitutionally sufficient investigation. *See Hamblin*, 354 F.3d at 491 (counsel failed to review client's mental health records, school records, and



IQ tests); *Ainsworth v. Woodford*, 268 F.3d 868, 874 (9th Cir. 2001) ("even though [counsel] obtained school records, counsel failed to examine [. . .] employment records, medical records, prison records, past probation reports, and military records"); *Jermyn v. Horn*, 266 F.3d 257, 307 (3d Cir. 2001) (counsel failed to obtain school records that disclosed childhood abuse); *Carter v. Bell*, 218 F.3d 581, 588-89 (6th Cir. 2000) (counsel failed to obtain a release from client to view prison records, and did not seek any other available records regarding the client or his family); *Glenn v. Tate*, 71 F.3d 1204, 1208 (6th Cir. 1995) (counsel failed to examine the client's school, medical, mental health, or probation records); *Baxter v. Thomas*, 45 F.3d 1501, 1513 (11th Cir. 1995) (counsel failed to request hospital, school, and child welfare records).

In this case, Mr. Rompilla's counsel failed to conduct the most basic of mitigation investigations suggested by the *ABA Guidelines*. Counsel failed to obtain fundamental records of Mr. Rompilla's background, including school records, and records of his prior adult and juvenile convictions, all of which were readily available to trial counsel in close proximity to the courtroom. *See Rompilla*, 355 F.3d at 273-74, 277, 281-82 (Sloviter, J., dissenting). Counsel also failed to interview several key family members who knew important mitigation information. *Id.* at 279-81. Even when counsel interviewed some members of the family, counsel failed to inquire about the client's past. *Id.*

While this Court has noted that it must avoid the "distorting effects of hindsight." *Strickland*, 466 U.S. at 689, the records that counsel failed to obtain showed: that Mr. Rompilla had experienced an extremely traumatic childhood under conditions of extreme poverty, parental neglect and abuse; that his IQ was repeatedly found to be in the mentally retarded range, and he was not able to advance functionally

past the third grade level; that he had demonstrated serious mental health abnormalities on scales measuring schizophrenia, paranoia, neurosis and obsessive/compulsive disorders; and that he had exhibited a history of debilitating alcoholism. *Rompilla*, 355 F.3d at 273-74, 278-79, 281-82, 284 (Sloviter, J., dissenting). The testimony that counsel should have obtained from other family members would have bolstered all of that evidence. *Id.* at 279.

### C. Counsel Has A Responsibility To Investigate The Aggravating Evidence.

Counsel's duty to investigate for the penalty phase of a capital trial includes the duty to conduct a reasonable investigation of potential aggravating factors that could be offered by the prosecution. The *ABA Guidelines* provide that "[t]he investigation for preparation of the sentencing phase . . . should comprise efforts to discover all reasonably available . . . evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *ABA Guidelines* § 11.4.1(C). Counsel should investigate areas that may relate to aggravation "at the earliest possible [time]." *ABA Guidelines* § 11.8.5(A). The importance of investigating potentially aggravating evidence at the earliest possible time is twofold. First, the possible aggravating evidence may contain leads that counsel can use to develop mitigating evidence. Second, "[b]ecause the scope of evidence admissible in mitigation is generally broader than that admissible in aggravation," investigating the potential aggravating evidence will prepare counsel to object at sentencing to "inadmissible evidence proffered by the prosecutor." *ABA Guidelines* § 11.8 cmt.

In *Wiggins*, this Court quoted from the *ABA Guidelines* and said that reasonable counsel should seek "all reasonably available . . . evidence to rebut any aggravating evidence that may be introduced." *Wiggins*, 539 U.S. at 524. This Court wrote that "in assessing the reasonableness of an attorney's



investigation, . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 525-26. That is particularly important with respect to the investigation of aggravating evidence.

Several lower federal courts, as well, have cited *ABA Guidelines* as evidence of professional norms concerning the investigation of aggravating evidence. *Allen v. Woodford*, 366 F.3d 823, 844-45 (9th Cir. 2004) (investigations in the penalty phase of a capital case should include "efforts to discover all reasonably available . . . evidence to rebut any aggravating evidence that may be introduced by the prosecutor"); *Hamblin*, 354 F.3d at 490 (same); *Starr v. Lockhart*, 23 F.3d 1280, 1285 (8th Cir. 1994) ("basic concerns" of capital counsel "are to neutralize the aggravating circumstances . . . and to present mitigating evidence"; counsel was ineffective because he failed to challenge aggravating factors).

In most cases, investigation of aggravating evidence will involve at least a thorough review of the defendants' prior convictions and juvenile convictions.

> Counsel must . . . investigate prior convictions, adjudications, or unadjudicated offenses that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside. Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction, adjudication, or unadjudicated offense.

*Updated ABA Guidelines* § 10.7 cmt. (citations omitted); *see also Esslinger v. Davis*, 44 F.3d 1515, 1529-30 (11th Cir. 1995) (counsel failed to investigate non-capital defendant's

criminal record, which was used to enhance sentence); *Lewis v. Lane*, 832 F.2d 1446, 1453-58 (7th Cir. 1987) (counsel failed to investigate portions of capital defendant's criminal record that were used to establish an aggravating factor). A review of the records from the client's prior convictions may provide valuable clues concerning mental health, or concerning other witnesses who possess potential mitigating testimony that might be offered in response to the aggravating evidence. *See Updated ABA Guidelines* § 10.7 cmt.; *see also Wiggins*, 539 U.S. at 527 (in assessing reasonableness, a court must consider "whether the known evidence would lead a reasonable attorney to investigate further").

In this case, had counsel conducted even a minimal investigation into the aggravating evidence that the prosecution gave notice it intended to introduce, counsel would have discovered key mitigating evidence. The prosecution gave notice before trial that it intended to offer evidence of Mr. Rompilla's criminal record in aggravation. The records from Mr. Rompilla's prior conviction and time in prison were available in the same courthouse where the trial occurred. *Rompilla*, 355 F.3d at 282. If counsel had obtained those records, Mr. Rompilla's counsel would have obtained leads indicating that it was necessary to investigate the history of their client's abuse by his family, alcoholism, neuropsychological problems and mental retardation. It would have been apparent that this evidence could be used in mitigation.

**D. Counsel's Duty To Conduct A Thorough Investigation Is Not Excused Merely Because The Client Or Family Members Are Uncooperative.**

The responsibility of conducting a thorough investigation in preparation for the capital sentencing proceeding rests solely with defense counsel. *ABA Guidelines* § 11.4.1(A).



That duty is separate from, and a necessary predicate to, the client's ultimate decision whether to present available mitigating evidence at the sentencing hearing. The duty also exists regardless of the cooperation counsel receives from the client or the client's family in gathering mitigation evidence or in investigating aggravation evidence.

It is not uncommon for clients facing the death penalty to be recalcitrant or otherwise unhelpful with respect to the penalty phase investigation. *See, e.g., Douglas v. Woodford*, 316 F.3d 1079, 1087 (9th Cir. 2003); *Silva v. Woodford*, 279 F.3d 825, 839-41 (9th Cir. 2002); *Carter*, 218 F.3d at 596; *Smith v. Stewart*, 140 F.3d 1263, 1269 (9th Cir. 1998); *Dobbs v. Turpin*, 142 F.3d 1383, 1387 (11th Cir. 1998).

> Counsel should bear in mind that much of the information that must be elicited for the sentencing phase investigation is very personal and may be extremely difficult for the client to discuss. . . . Obtaining such information [like childhood sexual abuse] typically requires overcoming considerable barriers, such as shame, denial, and repression, as well as other mental or emotional impairments from which the client may suffer.

*Updated ABA Guidelines* § 10.7 cmt.

The fact that it may be difficult to elicit this personal information does not excuse counsel from the duty to ask the client and others all questions necessary to probe for mitigating evidence, and to investigate through other sources, like school records, records from social service agencies, military records, prison records, and records from other criminal convictions. "[I]f a client forecloses certain avenues of investigation, it arguably becomes even more incumbent upon trial counsel to seek out and find alternative sources of information and evidence, especially in the context of a

capital murder trial." *Silva*, 279 F.3d at 847; *see also Coleman v. Mitchell*, 268 F.3d 417, 449-50 (6th Cir. 2001) ("[D]efendant resistance to disclosure of information does not excuse counsel's duty to independently investigate."); *Carter*, 218 F.3d at 596 ("The sole source of mitigating factors cannot properly be that information which defendant may volunteer; counsel must make some effort at independent investigation in order to make a reasoned, informed decision as to their utility.").

Moreover, while the decision whether to present to the fact finder any mitigation evidence may rest ultimately with the client, the *ABA Guidelines* make clear that "[t]he investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered." *ABA Guidelines* § 11.4.1(C). *See also Dobbs*, 142 F.3d at 1388 ("[L]awyers may not 'blindly follow' [clients' commands not to present mitigating evidence]. Although the decision whether to use mitigating evidence is for the client, . . . 'the lawyer first must evaluate potential avenues and advise the client of those offering possible merit.'") (quoting *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986)).

Family members and others who know the client personally can prove a reliable and valuable resource in the penalty phase investigation. *Updated ABA Guidelines* § 10.11 cmt. (those with personal knowledge of the defendant "can provide vivid first-hand accounts of the poverty and abuse that characterize the lives of many capital defendants"); *see also ABA Guidelines* § 11.8.3(F)(1) (counsel should investigate the "client's life and development, from birth to the time of sentencing") However, in some instances, those individuals do not assist the investigation, perhaps because they do not trust counsel, do not understand what information may be helpful to the



mitigation case, or simply have no direct knowledge of mitigating evidence. *See Updated ABA Guidelines* § 10.7 cmt. (family members may suffer from the same impairments as the client). This may be the case particularly where a client's past includes abuse, troubling medical history, or clear signs of mental deficiency.

In this case, counsel did not interview all of the family witnesses apparently because the client and some family witnesses were unhelpful. *Rompilla*, 355 F.3d at 279-81 (Sloviter, J., dissenting). There is also evidence that even when counsel interviewed some members of the family, counsel failed to inquire about the client's past. *Id.* Counsel's deficient performance cannot be excused by uncooperativeness on the part of the defendant and his family. That lack of cooperation made it all the more important that counsel investigate other sources of mitigation. Counsel should not assume that interviews yielding little in the way of mitigation evidence equate with the absence of such evidence. Quite the opposite. If interviews with family members are not fruitful in the way of mitigation information, counsel should intensify their search for background records of the client and investigate other potential mitigation sources. Counsel also should attempt to interview other extended family members, and "virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, or parole officers, and others." *Updated ABA Guidelines* § 10.7 cmt. (citations omitted); *see also ABA Guidelines* § 11.8.3(F)(1).

### E. Counsel Should Not Delegate To Experts The Determination Of The Scope Of The Investigation.

Defense counsel should consult with experts in preparation for the penalty phase of a capital trial, for expert witnesses are an important component of the penalty phase.

Areas in which experts may be helpful include: deciphering the prosecution's aggravation case; rebutting the prosecution's aggravation case; and presenting mitigation topics in defense counsel's case. *ABA Guidelines* § 11.4.1(D)(7). Experts can also be used "to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death[.]" *Updated ABA Guidelines* § 10.11. However, counsel cannot, consistent with prevailing professional norms, delegate his or her duty to investigate to experts.

The duty to investigate remains with counsel, regardless whether counsel consults with experts. *See ABA Guidelines* § 11.4.1. Counsel must not simply delegate the responsibility for conducting a thorough investigation of the client's background to expert witnesses. Nor should counsel assume that experts will independently obtain background information needed to carry out their role effectively. Rather than delegate the duty to investigate to experts, counsel should ensure that experts are apprised of and provided all reasonably available information necessary and helpful to the expert's role in the mitigation case. *Id.*

This Court and others have echoed the ABA's longstanding view that counsel has an "obligation to conduct a thorough investigation of the defendant's background," whether or not she hires expert witnesses. *Wiggins*, 539 U.S. at 522; *see Smith v. Stewart*, 189 F.3d 1004, 1012 (9th Cir. 1999) ("A lawyer who should have known but does not inform his expert witnesses about essential information going to the heart of the defendant's case for mitigation does not



function as 'counsel' under the Sixth Amendment."); *see also Bean v. Calderon*, 163 F.3d 1073, 1079 (9th Cir. 1998) ("When experts request necessary information and are denied it, when testing requested by expert witnesses is not performed, and when experts are placed on the stand with virtually no preparation or foundation, a capital defendant has not received effective penalty phase assistance of counsel").

In this case, Mr. Rompilla's counsel attempted to justify their failure to investigate records of their client's background by claiming that they relied on experts (who may have been engaged in preparation for the guilt/innocence phase and not the penalty phase), to tell them what records were needed for the experts' analysis. *Rompilla*, 355 F.3d at 280-81 (Sloviter, J., dissenting). Although experts may request certain documents or access to particular witnesses to complete their analysis, counsel should not assume that any potential source of mitigation evidence is not important because it was not requested by the expert. Counsel should instead independently seek to procure through investigation other mitigating evidence that may enhance the expert's analysis. Counsel's reliance upon experts to define the scope of their mitigation investigation was not in accordance with prevailing professional norms reflected in the *ABA Guidelines*.

## CONCLUSION

The ABA respectfully submits that the decision of the Third Circuit Court of Appeals should be reversed.

Respectfully submitted,

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